BANDAR ECO-SETIA SDN BHD A

v.

YIAP BEOW SOON & ANOR AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
HELILIAH MOHD YUSOF JCA
KANG HWEE GEE JCA
[CIVIL APPEAL NOS: B-02(IM)-397-2009 &
B-02(IM)-398-2009] C
2 SEPTEMBER 2009

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Appeal against - Injunction to restrain housing developer from selling or dealing with land - Developer withdrew letter of offer to sell on the ground that its offer to compensate for misrepresentation not accepted by purchaser within date given - Whether developer justified in withdrawing offer - Whether balance of convenience in favour of developer* D

LAND LAW: *Housing developers - Withdrawing of offer to sell property after 10% deposit paid - Developer's offer to compensate for misrepresentation not accepted by purchaser within date given - Whether developer justified in withdrawing offer to sell property* E

This was the appellant's appeal against the High Court's decision granting interlocutory injunction to the respondents to restrain the F
appellant from selling or dealing with a piece of land until the disposal of the appellant's action against the respondents. The appellant was a housing developer and had offered for sale a double storey bungalow house to the respondents. The respondents accepted the offer and paid 10% of the purchase price. Before a formal sale G
and purchase agreement could be executed, a dispute arose between the parties with respect to the area of the land on which the house was to be built. The appellant was prepared to compensate the respondents by virtue of renovation works requested by the respondents at the appellant's costs. The appellant was also prepared H
to reserve the house for the respondents until a specified date provided the respondents accepted the appellant's offer for compensation by that date. There were letters by the appellant to the respondents to that effect. The respondents only acknowledged and accepted the appellant's offer two months after that date. The I

A appellant then treated its offer as being lapsed and withdrew its offer to sell the house to the respondents. Hence, the respondents' interlocutory injunction as prayed for and granted by the High Court that led to the appellant's appeal herein.

B **Held (allowing the appeal with costs)**
Per Kang Hwee Gee JCA delivering the judgment of the court:

(1) The agreement between the parties involved the sale of land, and under s. 11(2) of the Specific Relief Act 1950, there was a presumption that "unless and until the contrary is proved, the
C breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money". Whether or not an interlocutory injunction would issue rested on which side the balance of convenience lies. (para 16)

D **(2)** The balance of convenience should tilt in favour of the appellant considering that the respondents only communicated their acceptance of the appellant's letter two months after the specified date despite the fact that the letter made it clear that they were required to communicate their acceptance by that
E date which was within a week. (para 17)

(3) It was in the appellant's interest as a housing developer to secure a firm sale of its houses soonest. A firm sale was a matter of utmost urgency. The appellant would have much more
F to lose if it was to be restrained from disposing the house until the respondents' claim could be disposed of by the court as against any intrinsic attachment that the respondents might have over the property. (para 17)

G ***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi kerana membenarkan injunksi interlokutori kepada responden-responden bagi menghalang perayu dari menjual atau berurusan dengan sebidang tanah sehingga tindakannya di mahkamah selesai.
H Perayu adalah pemaju perumahan dan telah menawarkan untuk jualan sebuah rumah banglo kepada responden-responden. Responden-responden menerima tawaran dan telah membayar 10% dari harga belian. Bagaimanapun, sebelum satu perjanjian yang formal dapat ditandatangani, pertikaian berbangkit di antara pihak-
I pihak berhubung kawasan tanah di mana rumah tersebut harus

dibina. Perayu bersedia untuk mempampasi responden-responden berkaitan kerja-kerja baikpulih yang diminta oleh responden-responden dan dilaksanakan atas kos yang ditanggung perayu. Perayu juga bersedia untuk merizabkan rumah untuk responden-responden hingga ke satu tarikh tertentu dengan syarat responden-responden menerima pampasan sebelum atau pada tarikh tersebut. Terdapat surat-surat dari perayu kepada responden-responden mengenai perkara-perkara ini. Responden-responden bagaimanapun hanya menerima tawaran perayu dua bulan selepas tarikh di atas berlalu. Perayu kemudian menganggap tawarannya sebagai telah luput dan menarik balik tawaran untuk menjual rumah kepada responden-responden. Ini membawa kepada permohonan injunksi interlokutori yang dibenarkan oleh Mahkamah Tinggi di atas, yang mana telah dirayui oleh perayu di sini.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Kang Hwee Gee HMR menyampaikan penghakiman mahkamah:

(1) Perjanjian di antara pihak-pihak melibatkan penjualan tanah, dan di bawah s. 11(2) Akta Relif Spesifik 1950, terdapat anggapan bahawa "kecuali dan sehingga sebaliknya dibuktikan, kemungkiran kontrak untuk memindahkan harta tak alih tidak boleh dilepaskan secukupnya melalui wang pampasan". Maka, sama ada atau tidak suatu injunksi interlokutori akan dikeluarkan bergantung kepada di pihak mana imbangan keselesaan berada.

(2) Imbangan keselesaan harus condong ke arah perayu mengambilkira bahawa responden-responden hanya menyampaikan penerimaan mereka terhadap surat tawaran perayu dua bulan selepas tarikh yang ditetapkan walaupun surat jelas menyatakan bahawa mereka dikehendaki menyampaikan penerimaan mereka pada atau sebelum tarikh tersebut iaitu dalam tempoh satu minggu.

(3) Adalah untuk kepentingan perayu sebagai pemaju hartanah untuk memastikan penjualan rumah-rumah dalam waktu yang secepat mungkin. Mengesahkan penjualan adalah malah suatu halperkara yang mendesak. Perayu akan lebih banyak menanggung kerugian jika ditahan dari menjual rumah sehingga tuntutan responden-responden diselesaikan oleh mahkamah berbanding apa jua nilai intrinsik yang dimiliki oleh responden-responden terhadap hartanah.

Legislation referred to:
Specific Relief Act 1950, s. 11(2)

For the appellant - Olivia Loh (FY Choong with him); M/s Gananathan Loh
For the respondents - Chew Kok Soon (Esther Geetha Jayaraja with him); M/s Chew Das & Jayaraja

[Appeal from High Court, Shah Alam; Civil Suit No: MT2-22-1904-2008]

Reported by Usha Thiagarajah

JUDGMENT

Kang Hwee Gee JCA:

[1] Enclosure 3 is an appeal from the decision of the High Court by the defendant appellant in allowing the plaintiffs' application for an interlocutory injunction to restrain the defendant from selling or dealing with the land until the disposal of the action.

[2] Enclosure 10 is an appeal from the decision of the High Court by the defendant appellant in dismissing its application to set aside the interlocutory injunction granted in favour of the plaintiffs.

[3] For ease of reference the appellant in both these cases is referred to as the defendant and the respondents as the plaintiffs as they appeared in the High Court.

[4] The defendant's application to set aside the *ex parte* interlocutory injunction (from which the appeal in encl. 10 arose) was rendered academic as it was not heard before the *inter parte* hearing (from which the appeal in encl. 3 arose).

[5] The plaintiffs' claim arose from a letter of offer dated 25 March 2007 of the defendant developer to sell a double storey bungalow to the plaintiffs which the plaintiffs had accepted.

[6] The offer was subjected to the execution of a formal Sale and Purchase Agreement and Mutual Covenants being signed by the parties upon the down-payment of 10% of the purchase price being paid to the defendant. The plaintiffs paid the 10% of the purchase price.

[7] Before the formal Sale and Purchase Agreement could be executed however, a dispute arose between the parties with respect to the area of the land on which the house was to be built. According to the plaintiffs when they visited the defendant's sales office before accepting the defendant's letter of offer to purchase, the representative of the defendant had represented to the plaintiffs that the built-up area was 5260 sq. feet but the plaintiffs claimed to have later discovered from the brochure that the built-up area was only 5071 sq. feet.

[8] The defendant's letter dated 27 May 2007 discloses that the defendant was prepared to compensate the plaintiffs with respect to the difference in the built-up area without admitting or disputing the plaintiffs' assertion of the representation by its sales representative by offering to effect minor amendments to the house should the plaintiffs decide to continue with the purchase.

[9] Thereafter the defendant's letter dated 10 October 2007 indicates that the defendant offered to accommodate the plaintiffs' request for renovation works as listed in para. 1 of the letter at the plaintiffs' cost. The letter also indicates that the defendant was prepared to reserve the house for the plaintiffs until 19 October 2007 provided the plaintiffs confirm the defendant's offer in the letter before this date. No reply appeared to have been received from the plaintiffs.

[10] By another letter dated 14 November 2007 it would appear that following additional requests made by the plaintiffs, the defendant was prepared to undertake the renovation of the items stated in the said letter at the "special incentive" cost of RM25,000 to the plaintiffs. The letter required the plaintiffs to "Kindly acknowledge and return your acceptance hereunder by 21 November 2007 …". The plaintiffs did not acknowledge nor accept the offer made by the defendant by 21 November 2007. They only acknowledged and accepted the offer two months later on 21 January 2008.

[11] Consequently, the defendant by a letter dated 30 January 2008 treated its offer to renovate on the terms as stated in its letter of 14 November 2007 as having lapsed and by another letter dated 14 March 2008, reiterated the same and made it clear that it would no longer sell the bungalow to the plaintiffs.

[12] Hence the plaintiffs' application for the following orders:

A (a) satu perintah supaya Defendan dihalang, sama ada dengan sendirinya dan/atau oleh perkhidmatnya dan/atau ejennya atau sebaliknya, daripada menjual, menceroboh dan/atau mengendalikan (deal with the land) hartanah yang dikenali sebagai HS (D) 243762 PT 20081 di Mukim Bukit Raja Daerah Petaling (selepas ini dirujuk sebagai "hartanah tersebut") dari tarikh perintah sehingga pendengaran dan penyelesaian pendengaran *inter parte* permohonan untuk injunksi interlokutori;

(b) Mana-mana perintah lain atau selanjutnya yang Mahkamah yang Mulia ini anggap adil dan perlu;

(c) Kos bagi permohonan ini.

[13] In deciding whether an interlocutory injunction should be granted, the court is required to apply the test in *Keet Gerald Francis* to ask first and foremost whether there is a serious question to be tried on the plaintiffs' claim; and if so to follow up with the question whether damages would provide an adequate remedy should the plaintiffs succeed in their claim; and if damages would not provide adequate remedy, to proceed to the next stage to decide on which party the balance of convenience should fall.

[14] The crux of the dispute, it is clear, lies in the question whether the defendant had by withdrawing its letter of offer committed a breach of agreement to sell the bungalow to the plaintiffs.

[15] There is therefore adequate ground for the learned judge to find that there is a serious question to be tried on this issue, although she did not proceed to the next step to consider whether damages would provide adequate remedy and where the balance of convenience lies. We are therefore constrained to consider anew these questions at this appellate stage.

[16] The agreement in this case involved the sale of land and under s. 11(2) of the Specific Relief Act 1950 there is a presumption that "unless and until the contrary is proved, ... the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money ...". Whether or not an interlocutory injunction would issue would therefore have to rest on which side the balance of convenience lies.

[17] Having heard the submission of the parties, we are unanimous that the balance of convenience should tilt in favour of the defendant considering that the plaintiffs only communicated their acceptance of the defendant's letter of offer of 14 November 2007 some two months late – despite the fact that the letter made it clear that they were required to communicate their acceptance by 21 November 2007, that is to say within a week. It must be appreciated that as a housing developer it is in the defendant's interest to secure a firm sale of its houses soonest. Needless to say, a firm sale is a matter of utmost urgency. The defendant would have much more to lose if it is to be restrained from disposing the bungalow until the plaintiffs' claim can be disposed of by the court as against any intrinsic attachment that the plaintiffs may have over the property.

[18] Accordingly, we are unanimous that the defendant's appeal on both enclosures be allowed with costs assessed at RM1,500. The deposit of RM500 is to be returned to the defendant.